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IN THE

Supreme Court of the United States

OCTOBER TERM, 1974

NO. 74-1008

JAMES M. BACON, et al, *Petitioners,*

v.

TEXACO, INC., *Respondent*

PETITION FOR CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

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PETITION FOR CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

James M. Bacon and other operators[1] of Texaco service stations in the Corpus Christi, Texas area petition for Writ of Certiorari to review the opinion of the United States Court of Appeals for the Fifth Circuit, which opinion holds that Petitioners failed to invoke jurisdiction under the Robinson-Patman Act.

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1. The other petitioners are Henry G. Baker, Jr., Otho C. Bean, Ray L. Brewton, Edward E. Burlison, Humberto Cantu, Louis G. Cantu, R. A. Coward, James M. Cotten, J. D. Ensminger, Jesse Gavlik, Charles R. Gentry, James F. Gentry, Robert S. Gonzales, Frank Guttierez, John Guzman, Bill T. Hughes, C. D. Jenkins, S. J. Kelley, Carl C. Jones, Joseph J. Lindsay, Enrique Longoria, Jr., Gus Munoz, T. F. Parker, Billy G. Patterson, J. B. Pearce, Ruben Riviera, Joe Spruce, Pedro R. Tamez, Jr., L. D. Williams, and L. L. Williams.

The decision of the court below was entered prior to the release of this Court's opinion in *Gulf Oil Corporation v. Copp Paving Company, Inc.*, No. 73-1012, decided December 17, 1974, and not yet officially reported, and is contrary to the rationale upon which this Court's rulings were based.

OPINION BELOW

The opinion of the United States District Court for the Southern District of Texas, Corpus Christi Division, entered on February 28, 1974, is reported at 371 F.Supp. 78 and is reproduced herein as Exhibit "A".

The opinion of the United States Court of Appeals for the Fifth Circuit, entered on November 13, 1974, does not yet appear in the Federal Reporter, but is reported in 1974-2 Trade Cases, para. 75, 358 and is reproduced herein as Exhibit "B."

JURISDICTION

The jurisdiction of the District Court was invoked under Section 2(a) of the Clayton Act as amended by the Robinson-Patman Act, of 15 U.S.C. § 13(a). The judgment of the Court of Appeals was entered on November 13, 1974. No motion for rehearing was filed. This petition is filed within the time prescribed by law. The jurisdiction of the Supreme Court is based on Title 28 U.S.C. § 1254(1).

ISSUES PRESENTED

1. Did the Courts below err in granting and affirming defendant's motion for summary judgment on the ground that Petitioners had failed to meet the jurisdictional re-

quirements for relief under Section 2(a) of the Robinson-Patman Act?

2. Can the "in commerce" or "flow of commerce" requisite for jurisdiction under Section 2(a) of the Robinson-Patman Act be met by a showing that:

(a) The goods sold were acquired by the seller as the result of interstate barter transactions, or

(b) the sales were subsidized by interstate and foreign operations, or

(c) the crude oil from which the gasoline sold was refined was, in large part, derived from out of state and foreign sources?

AND STATUTES INVOLVED

Clayton Act, Section 1, 15 U.S.C. § 12:

> " 'Commerce,' as used herein, means trade or commerce among the several States and with foreign nations . . ."

Clayton Act, Section 2(a), as Amended by the Robinson-Patman Act, 15 U.S.C. § 13(a):
"It shall be unlawful for any person engaged in commerce, in the course of such commerce, either directly or indirectly, to discriminate in price between different purchasers of commodities of like grade and quality, where either or any of the purchases involved in such discrimination are in commerce, where such commodities are sold for use, consumption, or resale within the United States or any Territory thereof or the District of Columbia or any insular possession or other place under the jurisdiction of the United States, and where the effect of such discrimination may be substantially to lessen competition or tend to create a monoply in any line

of commerce, or to injure, destroy, or prevent competition with any person who either grants or knowingly receives the benefit of such discrimination, or with customers of either of them: . . ."

STATEMENT OF THE CASE

Jurisdiction under Section 2(a) of the Robinson-Patman Act, 15 U.S.C. § 13(a), is the central issue in this case as in *Gulf Oil Corporation v. Copp Paving Company*, No. 73-1012, decided December 17, 1974, and not yet officially reported. The facts in this case, however, are in marked contrast with those in *Copp*.

Petitioners here are 31 operators of Texaco Service Stations in the Corpus Christi, Texas area. Their complaint was based upon the fact that during the four years immediately preceding the filing of this suit Respondent, Texaco, Inc. (hereinafter Texaco), had sold gasoline to a competing chain of retail stations operated by Texas Star Distributing Company (hereinafter Texas Star)[2] at a price approximately four cents per gallon cheaper than Texaco charged Petitioners for identical gasoline. The facts were not denied, but Texaco asserted—and the Courts below held—that the "in commerce" or "flow of commerce" jurisdictional requirement was not met because the particular gasoline sold to Petitioners and to the

2. Texas Star performs some distributor or wholesale activities, but its primary business is the operation of a chain of retail stations doing business under the Texaco sign in direct competition with Petitioners. Texaco granted Texas Star the "jobber discount" on all gasoline purchased regardless of whether for its wholesale or its retail operations.

3. Unless reference is made to record document or other authority, all facts are taken from the opinions of the courts below. The facts are uncontradicted.

favored competitor did not, in that exact form, cross a state line.

The Courts below rejected the following reasons advanced by Petitioners to show that the relevant gasoline was "in commerce" or in the "flow of commerce":

(1) During the four year period involved, a significant portion of the relevant gasoline sold in Corpus Christi was refined from crude oil which Texaco had brought to Texas from sources outside Texas. From August 1, 1967, through approximately July 1, 1969, the relevant gasoline was refined at Texaco's refinery in Port Arthur, Texas. Part of the petroleum came from Texaco's crude supplies in Louisiana, Texaco's largest domestic producing areas. A similar situation existed as to the petroleum refined by Coastal States Petrochemical Company (hereinafter Coastal States) and from July 1, 1969, through August 3, 1971, acquired from it by Texaco to supply the Corpus Christi market area. It was and is Petitioners' position that neither refining nor temporary storage should be deemed to break the "flow of commerce."

(2) During a portion of the period involved, Texaco acquired gasoline for its Corpus Christi market area from Coastal States pursuant to a crude processing agreement dated June 23, 1969. In July 1970 the agreement was modified in such a manner that the net effect was that Texaco delivered petroleum to the Coastal States Refinery in Corpus Christi; Texaco paid Coastal States a processing fee and in consideration therefor Texaco received from Coastal States gasoline and petroleum products both in Corpus Christi, Texas, and in Lake Charles, Louisiana.[4]

4. Record Document #37, Dennis Deposition at 45-46.

The transaction was simply a multi-state barter in which goods in two states were swapped instead of being physically transported from one state to another.

(3) As part of the consideration under the crude processing agreement, Texaco also received an option[5] to purchase, at market value, that portion of Coastal States' "import quota" attributable to the crude being processed for Texaco by Coastal States in Corpus Christi.[6] During the period involved, import activities were controlled by Presidential Proclamation No. 3279, March 10, 1958,[7] which established a mandatory program of import quotas under which the various refiners were granted the right to import only limited amounts of foreign petroleum, the quantity to be based on the level of refinery runs or on a historical formula. The right to import oil under a government permit, which was negotiable, was a valuable right.[8] The import rights which Texaco secured from Coastal States as a part of the Corpus Christi transaction were rights directly pertaining to foreign commerce. It was and is Petitioners' position that the terms of the agreement itself require that the gasoline sold under that agreement be deemed to be "in commerce."

(4) During the later portion of the period involved,

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5. Record Document #39, Plaintiffs' Reply to Defendant's Motion for Summary Judgment, Supporting Affidavit of D. S. Thomas, Attachment 6-19.

6. Record Document #37, Dennis Deposition at 14-15, 23-28.

7. 24 Fed. Reg. 1781. The program was substantially abandoned by Presidential Proclamation No. 4210, April 18, 1973, 38 Fed. Reg. 9645.

8. Record Document #37, Dennis Deposition at 23-28.

Texaco acquired the gasoline sold in Corpus Christi from Coastal States pursuant to an exchange agreement[9] under the basic terms of which Coastal States was to supply Texaco in Corpus Christi with stated quantities of gasoline, turbine fuel and fuel oil and Texaco was to supply like quantities of the same products to Coastal States at Port Arthur. In December 1970[10] the exchange agreement was so modified that Texaco received gasoline, turbine fuel and fuel oil at Corpus Christi from Coastal States, and in consideration therefor Coastal States received petroleum products from Texaco in Lake Charles, Louisiana, as well as in Port Arthur, Texas.[11] The gasoline received by Texaco for resale in Corpus Christi was an inseparable part of this barter of goods in one state for goods in another. Because the agreement was simply a substitute for the shipping of goods across state lines, the goods involved should be deemed to be "in commerce."

(5) Throughout the period in question, Texaco's import quota was proportionate to its volume of refinery runs. As Texaco's refinery volume at Port Arthur increased, so did the volume of its import rights.[12] The sales in Corpus Christi, therefore, were responsible for a portion of Texaco's import rights. The value and profit-

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9. Record Document #39, Plaintiffs' Reply to Defendant's Motion for Summary Judgment, Supporting Affidavit by D. S. Thomas, Attachments 0-32 through 0-59.

10. *Ibid.*, Attachments 0-35 through 0-37.

11. Record Document #37, Dennis Deposition at 46-51.

12. Record Document #30, Texaco's Supplementary Responses to Plaintiff's Second Set of Interrogatories, Answers to Interrogatory No. 5; Record Document #37, Dennis Deposition at 23-24.

ability of these rights in commerce cannot be denied,[13] and consequently, an important portion of Texaco's return on sales in Corpus Christi arose in foreign commerce.

(6) The specific facts reviewed above, in combination, establish that Texaco's sales in the Corpus Christi area were subsidized by its interstate and foreign operations to such an extent as to require that the Corpus Christi gasoline sales be deemed to be "in commerce."

REASONS FOR GRANTING THE WRIT

1. In *Copp*, this Court recognized the importance of a proper interpretation of the jurisdictional reach of the antitrust laws, specifically Section 2(a) of the Robinson-Patman Act, 15 U.S.C. § 13(a). The specific holding in that case was that the "in commerce" requisite could not be fulfilled by the mere showing of "a purely formal 'nexus' to commerce," but the opinion seemingly rejects the essentially wooden test has applied by the Court below—if the particular product involved did not itself cross the state line, it is not "in commerce." A broader reach of the statute is clearly indicated by the holding in *Copp* that the "in commerce" language extends to "persons and activities within the flow of interstate commerce—the practical, economic continuity in the generation of goods and services for interstate markets and their transport and distribution to the customer."

The facts in *Copp* made application of the above quoted language impossible, but the reverse is true of the case pre-

13. *Ibid.*, See also, hearings before Subcommittee on Anti-trust and Monopoly of the Senate Committee on the Judiciary, 91st Cong., 1st Sess., S. Rep. 40 (the Petroleum Industry), Pt. 1, at 6 (1969) (Statement of M. A. Adelman, Professor of Economics, M.I.T.).

sented by this application. The following factual differences are readily apparent from the face of the opinions:

COPP	*THIS CASE*
"[A]sphaltic concrete is made wholly from components produced and purchased intrastate."	"[P]etroleum refined at Port Arthur [Texas] came from Louisiana. . . . a similar situation existed as to petroleum refined in . . . Corpus Christi. (Exhibit "A," p. 19). "[T]he crude oil from which the gasoline was refined was shipped from another state." (Exhibit "B," p. 27).
"[T]he product's market is exclusively and necessarily local."	The gasoline refined by coastal states was transported by "pipeline extending over many states." (Exhibit "A," p. 22).
"Copp" failed to show, either by deduction from the evidence or from the evidence itself, that the alleged restraints . . . would affect any interstate market."	"Texaco's interstate and foreign operations and the existence of interstate dealings with Coastal States [to secure the gasoline sold] do not alter the nature of sales at issue." (Exhibit "B," p. 28).
"Copp does not contend that . . . [Defendants] in fact make interstate asphaltic concrete sales or otherwise directly involve in national markets."	"Coastal States . . . [supplier of the gasoline to Texaco in Corpus Christi] gave Texaco as part of the consideration of the refining contract, petroleum products located in another state." (Exhibit "B," p. 28).

COPP	*THIS CASE*
"Nor does it [Copp] contend that the local market in asphaltic concrete is an integral part of the interstate market in other component commodities or products."	"There are other facts, not in dispute, relating to the overall Texaco operations which Plaintiffs contend are material. These operations, such as its multi-state activities, including bartering in goods, its foreign business and import quotas, its crude-processing agreement with Coastal States and the several modifications, the pipeline extending over many states, the use of the Gulf Intercostal Waterway for transportation of gasoline, and others, are calculated as Plaintiffs see things, to show that the Texaco sales here complained about occurred in the 'flow of commerce'." (Exhibit "A," p. 22).

Petitioners' complaint was firmly "anchored in the economic realities of interstate markets, the intensely practical concerns that underly the purposes of the Antitrust Laws." Proper guidelines for the lower Courts cannot be provided solely by negative holdings. There is a genuine need for this Court's rulings as to specific facts meeting the "in commerce" requisite as a companion to the *Copp* explanation of why the requisite was not met.

2. The practical consequences, the transactions upon which the complaint here was based, are within the scope of the intent of the Clayton and Robinson-Patman Acts. Petitioners, it must be emphasized, do not advance a mere

"nexus" contention; instead, they submit that their complaint fits squarely into the category of situations intended to be included by the language added to the Clayton Act by the Robinson-Patman Act. The House Report explained:

> "[T]he following clause, contained in the opening portion of Section 2(a): '. . . where either or any of the purchases involved in such discrimination are in commerce. . .' is of first importance in extending the protection of this bill [the Robinson-Patman bill] against the full evil of price discrimination, whether immediately in interstate or intrastate commerce, wherever it is of such character as tends directly to burden or affect interstate commerce.[14]

A comparable interpretation was placed on the language by that portion of the Senate Report reading:

> "Specific phrases of section 2(a), as now reported, may be noted as follows:
>
> "One:
>
> "'. . . where either or any of the purchases involved in such discrimination are in commerce. . .'
>
> "Section 2(a) attached to competitive relations between a given seller and his several customers, and this clause is designed to extend its scope to discriminations between interstate and intrastate customers, as well as those purely interstate."[15]

Although Petitioners believe that, without regard to the intent of Congress, their case meets the jurisdictional

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14. H.R. Rep. 2287, 74th Cong., 2d Sess. (1936), at 8.

15. S. Rep. No. 1502, 74th Cong., 2d Sess. (1936), at 4.

requirements of the statutory language as construed in *Copp*, that decision leaves open, if it does not in fact invite, the possibility of some expansion of the "facially narrow language" on the basis of Congressional intent. Clearly, Congress was concerned with a broader range of transactions than merely those in which a particular product crosses a state line. The Court below followed a rule of thumb which restricts the applicability of the statute as it was intended to be applied; that rule should be specifically rejected.

3. Approval of the opinion of the Court below, even by denial of certiorari, would provide a blueprint by which any producer of goods could avoid the application of the statute here involved. If a product's physical crossing of a state line is requisite to jurisdiction, producers can exchange products, as was done here, or if that is not feasible, a producer can sell his goods to a subsidiary corporation established for that purpose in a state where discriminatory sales will result in an overall benefit to the parent corporation. In neither instance, under the decision of the Court below, could any resulting discriminatory sale be brought within the jurisdiction of the federal courts.

4. There is a genuine need for clarification of the type or degree of modification of material which halts the "flow of commerce." Petitioners considered the refining of crude oil as being comparable with the processing of raw milk. In each instance the components of the end product—gasoline in one instance and homogenized milk in the other—are all present in the natural or initial state. The purpose of processing is to separate the various elements in the original substance and recombine them into products for which there are more

uses and a greater market demand.—butter, cream, whole milk, homogenized milk, skim milk, or propane, butane, gasoline, heavy oils. Reliance, therefore, was placed in the Court below on *Foremost Dairies Inc. v. F.T.C.*, 348 F.2d 674 (5th Cir. 1965), cert. den., 382 U.S. 959, wherein it was held that the end product sold in New Mexico was in the "flow of commerce" upon the basis of facts showing that a portion of the raw milk processed at Foremost's plant in New Mexico had been produced in Colorado.

Instead of following that decision, the Court below adopted *Belliston v. Texaco, Inc.*, 455 F.2d 175 (10th Cir. 1972), cert. den., 408 U.S. 928, wherein it was held that "when crude oil is refined into gasoline, the character of these products is so changed that they cannot be equated to the 'same stuff' to satisfy the requirements of the 'flow of commerce' of theory" (455 F.2d 180). Since certiorari was denied in each case, the two would appear to have equal standing, but unless decisions should be made on a product by product basis, they appear to be conflicting in that contrary holdings were made as to "flow of commerce" although in both the final commodities were produced essentially, if not entirely, from a single raw product which crossed the state line.

It may be true, for example, that the manufacture of an automobile from steel, leather, wood, rubber and plastic halts the flow of commerce of the various constituent products; but contrary to the reasoning in *Belliston*, gasoline is essentially the "same stuff" which crossed the state line. The gasoline was in the crude when it was pumped from the earth in Louisiana; the refining process

in Texas only separated the elements in the crude oil and reconstituted those same elements into various petroleum products.

Moreover, the approach taken in *Belliston* is not anchored in economic realities or in the intensely practical concerns which underlie the purposes of the antitrust laws. By inference, at least, the "same stuff" test is condemned by *Copp*.

CONCLUSION

The need for proper interpretation of the jurisdictional reach of the Robinson-Patman Act, a need recognized but incompletely developed in *Copp* because of the facts therein, establishes the national importance of the case presented by this application. Only this Court can provide a practical test for applying the judicial requirements to the economic realities of modern interstate marketing.

PRAYER

Petitioners, therefore, pray that this Petition for Writ of Certiorari be granted.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I, Mary Joe Carroll, a member of the Bar of the Supreme Court of the United States, hereby certify that I have served the foregoing Petition for Certiorari on counsel for Respondent by depositing same in the United States mail, postage prepaid, on February 7, 1975, addressed to Charles F. Kazlauskas, Jr., 135 East 42nd Street, New York, New York 10017; James W. Wilson, McGinnis, Lochridge and Kilgore, 5th Floor, Texas State Bank Building, Austin, Texas 78701; Miles C. Bradford, Jr., P. O. Box 2100, Denver, Colorado, 80201; and Ben A. Donnell, Meredith and Donnell, The 600 Building, Corpus Christi, Texas 78403, counsel for Texaco, Inc.

Mary Joe Carroll

MARY JOE CARROLL

EXHIBIT "A"

MEMORANDUM AND ORDER

OWEN D. COX, District Judge.

The Plaintiffs in this suit are persons who, at the time this suit was filed (August 3, 1971) or during the previous four years, individually operated one or more gasoline service stations at various locations in the vicinity of Corpus Christi, Nueces County, Texas. The Defendant is Texaco, Inc., (called Texaco) and it leased to each one of these Plaintiffs the particular service station or stations which he operated. Each Plaintiff dispensed gasoline purchased from the Defendant, and did business under the "Texaco" sign.

The Plaintiffs contend that the Defendant has violated Section 2(a) of the Clayton Act, as amended by the Robinson-Patman Act, 15 U.S.C., § 13(a) (1964) as to each one of them; and that the violations resulted because Texaco sold gasoline in Corpus Christi, Texas, to a local business called Texas Star Distributing Company (called Texas Star) at lower prices than the Plaintiffs had to pay. They complain that although Texas Star was a jobber, it was primarily in the business of operating ten (10) retail service stations. The violations occurred during the period August 2, 1967, through August 3, 1971. Admittedly, Texas Star received Texaco's standard-distributor discount; that is, Texas Star was able to buy Texaco's gasoline at a lesser price than the price which the Plaintiff dealers had to pay. The price of gasoline to Texas Star was without regard as to whether it would sell to retailers or use it in its own stations. This allegedly gave the Texas Star stations an advantage over these Plaintiffs in the retail

trade of approximately .04 [four] cents per gallon. Thus, the Plaintiffs ask for injunctive relief under Section 16 of the Clayton Act, 15 U.S.C., § 26 (1964); for treble damages of several millions of dollars, in accordance with Section 4 of the Clayton Act, 15 U.S.C., § 15 (1964); and for costs of suit and attorney's fees.

This action was originally filed in the Western District of Texas. The Defendant, subject to its motion to transfer venue, answered and the Plaintiff demanded a jury. Thereafter, by order dated November 1, 1971, the venue of this cause was transferred to the Southern District of Texas, Corpus Christi Division. After pursuing discovery for a time, it became apparent that a great deal more investigation by both parties would be necessary before a trial could be had on the merits. This being the case, the parties filed a joint motion to continue a pre-trial conference from December 18, 1972, until a later date and that discovery, except such as would be pertinent to the question of jurisdiction, be stayed pending a decision by this Court on that question. This motion was granted. The Defendant has now filed its motion for summary judgment, and the jurisdiction question is before the Court. Plaintiff has filed a motion for partial summary judgment, but it will rise or fall depending on the Court's decision as to Defendant's motion.

During the period August 2, 1967, through August 3, 1971, all of the gasoline sold by Texaco to the Plaintiffs and to Texas Star Distributing Company was derived from crude oil by a process known as refining. This was done in the State of Texas. More specifically, and prior to August 1, 1967, through approximately July 1, 1969, all of said gasoline was refined at Texaco's refinery located in Port Arthur, Texas, and transported to Corpus Christi by

barge via the Gulf Intracoastal Waterway (known as the Intracoastal Canal) and stored at the Corpus Christi terminal of Texaco. It is not denied that the canal is a navigable waterway. From approximately July 1, 1969, to August 1, 1970, all said gasoline sold by Texaco to Plaintiffs and Texas Star was refined by the Coastal States Petrochemical Company (called Coastal States) refineries located in Corpus Christi, Texas, pursuant to a crude-processing agreement dated June 23, 1969. From approximately August 1, 1970, through August 3, 1971, all of said gasoline was refined by the above described Coastal States refinery and acquired by Texaco in Corpus Christi, Texas, pursuant to an exchange agreement dated August 6, 1970.

The Plaintiffs do not deny the facts that have just been set forth, but do take issue with the interpretation placed on them and also point to additional facts which they consider material on the question of jurisdiction. The Plaintiffs say that a significant portion of the crude oil, sometimes referred to herein as petroleum, processed during the period of August 1, 1967, through July 1, 1969, at Texaco's Port Arthur refinery and sold to Plaintiffs in Corpus Christi was produced outside of Texas. And that from July 1, 1969, to August 1, 1970, crude oil derived from outside of Texas was delivered by Texaco to the Coastal States refinery in Corpus Christi, where it was refined on behalf of Texaco for a processing fee, and then delivered to Texaco's Corpus Christi terminal by pipeline. There appears to be no dispute that, during the four-year period here involved, a significant portion of the crude oil which was refined in Texas, by Texaco or for it, came from outside the state. Part of this petroleum refined at Port Arthur came from Louisiana. Texaco's largest domestic pro-

ducing area, by a Texaco-owned pipeline. A similar situation existed as to petroleum refined by Coastal States in Corpus Christi. The refined gasoline was then delivered from the Texaco terminal to the purchasers by tank truck unless the purchaser, that is, the customer, picked up the gasoline at the terminal.

Plaintiffs also say that the refining of gasoline is, in principle, merely the separation of gasoline from the other hydrocarbons in the petroleum. Thus, this refining process should not be deemed to break the flow of the product from the time of its out-of-state production and the importation into Texas until its ultimate sale in Corpus Christi. They say that, as a matter of fact, the refining process was such that it did not interrupt the flow of commerce from the time the crude crossed the state line on its way to Texaco's Port Arthur refinery or to Coastal States refinery until it was sold to Plaintiffs in Texas.

[1] Insofar as this Court is concerned, the legal effect of refining gasoline from crude oil is no longer in dispute. Such processing does interrupt the flow of commerce. The petroleum, while it goes through the changing process, ceases being "in commerce" as that term is used in the Clayton Act, as amended by Robinson-Patman, 15 U.S.C., § 13(a). The cases of Belliston v. Texaco, Inc., 455 F.2d 175 (10th Cir. 1972), cert. den., 408 U.S. 928, 92 S.Ct. 2494, 33 L.Ed.2d 341 (1972); Braley v. Texaco, Inc., (C.A. 3-5311-E) (N.D. Tex. 1973); Izumi v. Shell Oil Co., 1973 CCH Trade Cases, ¶73,274 (N.D. Col. 1972); and Myers v. Shell Oil Co., 96 F.Supp. 670 (S.D. Cal. 1951), have established this. The Fifth Circuit has not written on the particular point with which we are here concerned, but has cited *Belliston* without qualification.

And the Court's research indicates there are no cases to the contrary.

Plaintiffs rely on Foremost Dairies, Inc. v. F. T. C., 348 F.2d 674(5th Cir. 1965), and the other milk processing cases. They are not applicable because of the much less drastic method of processing. There is very little change in it from the milking to the drinking. The case of Hardrives Co. v. East Coast Asphalt Corp., 329 F.2d 868 (5th Cir. 1964), apparently seems important to Plaintiffs. It involves bitumen, a by-product obtained in refining crude oil. Shell Oil Company shipped that substance into Florida from outside the state, and stored it. While the bitumen was stored, it was kept hot and liquid, and when delivered to the Defendants, East Coast Asphalt Corp., et al, who prepared the "hot mix asphalt," it was in the same condition as when it was brought into the state, except it had been blended to meet certain viscosity specifications set by the State of Florida. Such paving material is made by mixing the bitumen with rock and sand. The principal ingredient is bitumen and there is nothing to indicate it is altered by the mixing. We do not quarrel with *Foremost Dairies, Inc.*, supra, or *Hardrives Co.* that the particular commodities there involved continued in commerce. But, we are not willing to disregard *Belliston v. Texaco, Inc.*, supra, because of either of those cases. We also point out that the only jurisdictional question before the Fifth Circuit there had to do with the Sherman Act, which has considerably broader coverage than Clayton-Robinson-Patman. *Cliff Food Stores v. Kroger, Inc.*, 417 F.2d 203 (5th Cir. 1969); *Lehrman v. Gulf Oil Corp.*, 464 F.2d 26 (5th Cir. 1972).

There are other facts, not in dispute, relating to the overall Texaco operations which Plaintiffs contend are material. These operations, such as its multistate activities, including bartering in goods, its foreign business and import quotas, its crude-processing agreement with Coastal States and the several modifications, the pipeline extending over many states, the use of the Gulf Intracoastal Waterway for transportation of gasoline, and others, are calculated, as the Plaintiffs see things, to show that the Texaco sales here complained about occurred in the "flow of commerce" and thus meet the "effect on commerce" test which Plaintiffs say should govern here. They seriously take the federal courts to task for having limited the coverage under Robinson-Patman, 15 U.S.C., § 13(a), to "fewer transactions than could be constitutionally reached." In addition to the discussion of the foregoing facts, a careful review of the legislative history of the Robinson-Patman Act has been provided this Court in support of a broader interpretation of the Act.

[2] But, Littlejohn v. Shell Oil Co., 483 F.2d 1140 (5th Cir. 1973, en banc), cert. den., 414 U.S. 1116, 94 S.Ct. 849, 38 L.Ed.2d 743 (1973), has settled the question for this Court. The statutory language requiring discriminatory sales to be "in commerce" is narrower than the "effect on commerce" test applicable under the Sherman Act. *Lehrman v. Gulf Oil Corp.*, supra, also approved this analysis.

Littlejohn also demonstrates that Moore v. Mead's Fine Bread Company, 348 U.S. 115, 75 S.Ct. 148, 99 L.Ed. 145 (1954), does not expand the coverage under Robinson-Patman. So, Plaintiffs can get no consolation out of *Mead's Fine Bread* in the Fifth Circuit.

[3] This Court concludes that it has no jurisdiction to proceed with this case and that the motion for summary judgment filed herein by the Defendant should be granted. IT IS SO ORDERED. There are no controverted facts involved and no indication that the Plaintiffs could produce other facts which might show sales made "in commerce," as this Court has interpreted such language. The motion for partial summary judgment of Plaintiffs must be denied. A final judgment granting summary judgment to Defendant will be prepared and signed by the Court. The Clerk shall furnish copies of this memorandum and order to appropriate counsel.

EXHIBIT "B"

[¶75,358] James M. Bacon, et al. v. Texaco, Inc.

U. S. COURT OF APPEALS
Fifth Circuit.

No. 74-2045

Dated November 13, 1974.

Before: THORNBERRY, AINSWORTH and CLARK, Circuit Judges.

[Opinion]

PER CURIAM: Appellants sought treble damages and injunctive relief against Texaco, Inc. for alleged violations of the price discrimination provisions of Section 2(a) of the Clayton Act, as amended by the Robinson-Patman Act, 15 U.S.C.A. § 13(a). The sole issue on appeal is whether the underlying transaction giving rise to their claim crossed the interstate threshold of Robinson-Patman so as to avoid the summary judgment granted by the district court below. We hold that it does not and affirm.

[*Jobber Discount*]

Appellants are thirty-one gasoline retailers in the Corpus Christi, Texas area who lease their stations and purchase their gasoline from Texaco and do business under the "Texaco" sign. They claim injury from the sale of gasoline by Texaco to Texas Star Distributing Company (Texas Star), the operator of a chain of Texaco retail service stations, at a price approximately four cents per gallon cheaper than that paid by appellants. Appellants assert that

Texas Star was in direct competition with them and that the "favored customer discount" that it received bore little relation to any distribution or wholesale functions that Texas Star performed for Texaco.

The material facts of the sale are stipulated and Texaco readily agreed that Texas Star received a jobber discount. But in defense Texaco challenges appellants' right to bring this price discrimination claim within the "in commerce" language of Section 2(a) of the Robinson-Patman Act. After extensive discovery on that issue by both parties, the district judge granted Texaco's motion for summary judgment.

[*Sales Affecting Commerce*]

Appellants mount two principal assaults. First, but quixotically, they directly challenge the long-accepted interpretation of the "sale in commerce" language of Section 2(a) of the Robinson-Patman Act which restricts price discrimination cases to sales occurring, at least in part, in interstate commerce. E.g. *Littlejohn v. Shell Oil Co.* [1973-2 TRADE CASES ¶ 74,645], 483 F.2d 1140 (5th Cir.), cert. denied, 414 U.S. 1116, 94 S.Ct. 849, 38 L.Ed.2d 743 (1973); *Lehrman v. Gulf Oil Corp.* [1972 TRADE CASES ¶74,054], 464 F.2d 26, 37 (5th Cir), cert. denied, 409 U.S. 1077, 93 S.Ct. 687, 34 L.Ed.2d 665 (1972); *Cliff Food Stores, Inc. v. Kroger, Inc.* [1969 TRADE CASES ¶72,923], 417 F.2d 203, 208-210 (5th Cir. 1969); *Walker Oil Co. v. Hudson Oil Co.* [1969 TRADE CASES ¶72,873], 414 F.2d 588, 589-590 (5th Cir. 1969); *Hiram Walker, Inc. v. A & S Tropical, Inc.* [1969 TRADE CASES ¶72,698], 407 F.2d 4, 9 (5th Cir. 1969), cert. denied, 396 U.S. 1042, 90 S.Ct. 684, 24 L.Ed.2d 686 (1970). They argue that the statutory language should be

read broadly, in accord with the original congressional intent,[1] to encompass the full scope of the Commerce Clause as does the Sherman Anti-Trust Act, thereby including within the coverage of the Robinson-Patman Act any sale which has an "effect on commerce" regardless of whether the sale itself is interstate in nature. Despite their vigorous and cogent advocacy, the weight of existing precedent mandates that the federal act not be extended to afford intrastate relief.

Whatever may be its ambiguous history,[2] the phrasing of the Robinson-Patman Act clearly dictates that a particular sale is subject to its sanction only if: (1) the seller is engaged in commerce; (2) in the course of such commerce, the seller has discriminated in price between different purchasers of commodities of like grade and quality; (3) *"either or any of the purchases involved in such discrimination are in commerce";* and (4) there is likely to be a severe, adverse effect on competition.[3] To permit suits to be brought under this provision for price discrimination in intrastate sales of the type at issue in this litigation would be to ignore the explicit words of the statute and make it a panacea for every sort of pricing disparity.

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1. As support for their argument that Congress intended the Robinson-Patman language to be read broadly, appellants cite H. R. Conf. Rep. No. 2951, 74th Cong., 2d Sess., 6 (1936) in which it was explained that the more expansive House version of the Act that specifically prohibited intrastate price discrimination sales was deleted by the Joint Conference solely because the "in commerce" language was understood to reach the same result.

2. See 86 Harv. L. Rev. 765 (1973), asserting that the legislative history of Robinson-Patman reveals an ambivalent congressional intent. *Contra,* Note, The Commerce Requirement of the Robinson-Patman Act, 22 Hastings L. J. 1245 (1971).

3. 15 U.S.C.A. § 13(a) (Emphasis added).

[*Interstate Crude Oil*]

Anticipating the probability that this court would continue to follow the considerable precedent requiring an interstate sale for Robinson-Patman jurisdiction, appellants' second and alternative contention is that the network of sales involved in this case meets the "in commerce" requirement as construed by existing case law. We reject this position also. Appellants first argue that the sales at issue here were conducted in the "flow of commerce" since the crude oil from which the gasoline was refined was shipped from another state. While it is true that the Supreme Court and this court have held that when a sale occurs in the "flow of commerce," the sale is deemed to be "in commerce" under the Robinson-Patman definition, [e.g., *Standard Oil Co. v. FTC* [1950-1951 TRADE CASES ¶ 62,746], 340 U. S. 231, 71 S.Ct. 240, 95 L.Ed. 239 (1951) (the gasoline itself was shipped across a state line so the "flow of commerce" was not interrupted); and *Foremost Dairies, Inc. v. FTC* [1965 TRADE CASES ¶ 71,500], 348 F.2d 674 (5th Cir.), cert. denied, 382 U.S. 959, 86 S.Ct. 435, 15 L.Ed.2d 362 (1965) (the milk underwent "rather negligible processing" so the "flow of commerce" was not interrupted)], those decisions are inapplicable here since the sales at issue in this case, unlike the sales in *Standard Oil Co.* and *Foremost Dairies, Inc.*, involve products which have undergone substantial change through processing after entering the State of sale. The extensive process involved in refining crude oil into gasoline results in the alteration of the nature of the product. No "flow of commerce" ever took place as to the gasoline which is the subject of this claimed wrong. Therefore the prior travels of the atoms and molecules of crude oil from which it came are not determinative of

the inter- versus intra-state nature of the end product refined therefrom. *Belliston v. Texaco, Inc.* [1972 TRADE CASES ¶ 73,837], 455 F.2d 175 (10th Cir.), cert. denied, 408 U.S. 928, 92 S.Ct. 2494, 33 L.Ed.2d 341 (1972).[4]

Similarly, we reject appellants' additional arguments that the transactions were in commerce because the gasoline was transported in a navigable waterway of the United States, the Gulf Intracoastal Waterway, or because Coastal States (the independent refinery that processed part of the gasoline at issue here) gave Texaco, as part of the consideration for the refining contract, petroleum products located in another state. The fact that some of the gasoline was transported within Texas on navigable waterways is of no jurisdictional significance, and, as *Littlejohn, supra,* clearly mandates, Texaco's interstate and foreign operations and the existence of interstate dealings with Coastal States do not alter the nature of the sales at issue in this case.

Because we also find appellants' remaining arguments unpersuasive, we affirm the summary judgment below.

Affirmed.

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4. See also *Scranton Constr. Co. v. Litton Indus. Leasing Corp.* [1974-1 TRADE CASES ¶75,087], 494 F.2d 778, 781 (5th Cir. 1974) ("the interstate movement of mere ingredients [does not] suffice.").

SUPREME COURT, U. S.
Supreme Court, U. S.
FILED
MAR 12 1975
MICHAEL RODAK, JR., CLERK

IN THE

Supreme Court of the United States

October Term, 1974

No. 74-1008

JAMES M. BACON, *et al.*,

Petitioners,

v.

TEXACO INC.,

Respondent.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Fifth Circuit

MEMORANDUM FOR RESPONDENT TEXACO INC. IN OPPOSITION

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MEMORANDUM FOR RESPONDENT TEXACO INC. IN OPPOSITION

It is respectfully submitted that the Court's recent decision in *Gulf Oil Corp.* v. *Copp Paving Co.*, 43 U.S.L.W. 4059 (December 17, 1974), deals dispositively with the issues presented by the Petition and leaves no reason for grant of the Writ.

This is an action for alleged violations of the price discrimination provisions of Section 2(a) of the Clayton Act, as amended by the Robinson Patman Act, 15 U.S.C.A. §13

(a). The petitioners are gasoline retailers in Corpus Christi, Texas, who complain that Texaco sold gasoline to the Texas Star Distributing Company in that city for four cents below the price it charged them. It is undisputed that the gasoline sold to both the petitioners and the allegedly favored purchaser was refined in Texas and sold to them there (Pet. 4-5). As none of the gasoline purchases involved in the alleged discrimination was "in commerce," the District Court granted summary judgment (Pet. Ex. A), 371 F.Supp. 78 (S.D. Tex. 1974), and the Court of Appeals affirmed *per curiam* (Pet. Ex. B), 1974-2 Trade Cas. ¶75,358 (5th Cir. 1974).

This Court's *Copp* decision fully confirms the validity of the decisions below. It explains:

> "With almost perfect consistency, the circuit courts have read the language requiring that 'either or any of the purchases involved in such discrimination [be] in commerce' to mean that §2(a) applies only where 'at least one of the two transactions which, when compared, generate a discrimination * * * cross a state line' [citing *"Hiram Walker, Inc.* v. *A & S Tropical, Inc.*, 407 F.2d 4, 9 (CA 5), cert. denied, 396 U.S. 901 (1969); *Belliston* v. *Texaco Inc.*, 455 F.2d 175, 178 (CA 10), cert. denied, 408 U.S. 928 (1972)"]. In the face of this long standing interpretation and the continued congressional silence, the legislative history does not warrant our extending §2(a) beyond its clear language to reach a multitude of local activities that hitherto have been left to state and local regulation." 43 U.S.L.W. at 4063-64.

Accordingly, the decision holds that "[u]nless it appears * * * that at least one of [the seller's] allegedly discrimina-

tory sales was made in interstate commerce (§2(a)), [plaintiff's] claims must fail." *Id.* at 4062.

Since this requirement is not met in this case, the Petition omits any reference to these controlling principles of the *Copp* decision and, indeed, seems to deny their existence.[1] It proceeds to focus on immaterial factual differences (Pet. 9-10) and to urge that because some of the raw crude oil which was refined in Texas into gasoline and other petroleum products emanated from out-of-state, this should suffice (*id.* at 12-3).[2]

However, *Copp* made emphatically clear that if the statutory requisites are now to be deleted or altered, it is Congress, and not this Court, which will have to change the law. Under the statute as it presently stands, there is no violation where the purchases by the favored and disfavored customers are both—as here—entirely intrastate.

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1. For example, referring to *Copp*, the Petition states at one point:

> "that decision leaves open, if it does not in fact invite, the possibility of some expansion of the 'facially narrow language' on the basis of Congressional intent" (Pet. 12).

Elsewhere, it goes further and asserts that

> "the opinion seemingly rejects the * * * test * * * applied by the Court below—if the particular product involved did not itself cross the state line, it is not 'in commerce'" (*id.* at 8).

2. This notion, as the Courts below observed, has been uniformly rejected. Pet. Ex. A, p. 20 (371 F. Supp. at 80); Pet. Ex. B, pp. 27-8 (1974-2 Trade Cas. at 98,144). Since the origin of the raw materials from which a product involved in discriminatory sales is produced has no relevance to the statutory test, the *Copp* opinion does not refer to the sources of the crude oil from which the asphalt in that case was produced.

It is respectfully submitted, therefore, that the Petition should be denied.

Respectfully submitted,

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